IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 8, 2009

STATE OF TENNESSEE v. LAWRENCE D. RALPH, JR.

Appeal from the Circuit Court for Warren County
No. F-11065 Larry B. Stanley, Jr., Judge

No. M2009-00729-CCA-R3-CD - Filed February 10, 2010

Following a jury trial, the Defendant, Lawrence D. Ralph, Jr., was convicted of one count of each of the following: initiating a process to manufacture methamphetamine, a Class B felony, simple possession of methamphetamine, simple possession of marijuana, and possession of drug paraphernalia, each a Class A misdemeanor. See Tenn. Code Ann. §§ 39-17-435(f), -418(c), -425(a)(2). He was sentenced as a Range II, multiple offender to seventeen years for initiating a process to manufacture methamphetamine and eleven months and twenty-nine days for each misdemeanor. The trial court ordered the Defendant to serve his misdemeanor sentences concurrently with each other and his felony sentence, for a total effective sentence of seventeen years in the Department of Correction. In this appeal, the Defendant contends that: (1) the trial court erred in denying his motion to suppress evidence recovered from his person; (2) the State presented evidence insufficient to convict him of initiating a process to manufacture methamphetamine; (3) the trial court erred in allowing the State to impeach a defense witness using a prior statement that had not been provided in discovery in violation of Tennessee Rule of Criminal Procedure 16; (4) a Tennessee Bureau of Investigation ("TBI") lab report was erroneously admitted; (5) the trial court erred in denying him a continuance following a witness' failure to appear; and (6) the trial court erred in sentencing the Defendant to seventeen years. After our review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the Court, in which ALAN E. GLENN and ROBERT W. WEDEMEYER, JJ., joined.

L. Scott Grissom, McMinnville, Tennessee, for the appellant, Lawrence D. Ralph, Jr.

Robert E. Cooper, Jr. Attorney General and Reporter; Deshea Dulany Faughn, Assistant Attorney General; Lisa Zavogiannis, District Attorney General; and Thomas Miner, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

Testimony in this case was heard at a suppression hearing on October 22, 2008, and at the Defendant's October 23, 2008 trial. Testimony at the suppression hearing established that the events underlying this case took place on March 9, 2007. Deputy Kevin Murphy of the Warren County Sheriff's Department testified that on that day, he was asked to go the Arms Apartments in McMinnville to investigate an informant's tip that the Defendant and a man named Paul Hale were manufacturing methamphetamine. Deputy Murphy also had been advised that warrants were outstanding for Mr. Hale's arrest. Deputy Murphy established that he had gained significant experience in methamphetamine investigations.

Deputy Murphy knocked on the door of the designated apartment at about noon on March 9. Jacqueline Calaway opened the door. Deputy Murphy explained to her that he was trying to locate Mr. Hale; Ms. Calaway invited Deputy Murphy and two other deputies inside. Upon entering the apartment, Deputy Murphy smelled odors that he recognized as being produced by the manufacture of methamphetamine. He also saw Mr. Hale and the Defendant inside the apartment. Deputy Murphy then arrested Mr. Hale and searched his pockets, finding a small amount of methamphetamine and two coffee filters.

Having determined that Ms. Calaway resided in the apartment, Deputy Murphy asked her for consent to search the other rooms. Ms. Calaway consented. In the kitchen, Deputy Murphy found a garbage bag full of chemicals and items used in the manufacture of methamphetamine. During the search, Deputy Murphy also noticed that the Defendant had iodine stains on his pants; Deputy Murphy testified that iodine spills were a common occurrence during the methamphetamine manufacturing process, as iodine is "one of the three main ingredients in the manufacture of meth[amphetamine]." Deputy Murphy then placed the Defendant under arrest and searched his pockets, finding a small amount of methamphetamine, the butts of a few marijuana cigarettes, and a syringe cap. Deputy Murphy testified that the Defendant had been free to leave before the "meth lab" in the kitchen was found. Deputy Murphy also clarified that a third occupant of the apartment was released because Deputy Murphy did not find sufficient evidence tying him to manufacturing methamphetamine.

The Defendant also testified at the suppression hearing. He said he exited the apartment's bedroom when he heard Ms. Calaway talking to Deputy Murphy. Deputy

Murphy grabbed the Defendant and would not let him leave. The Defendant testified that he would have left the apartment if given the chance. The Defendant said he had no contraband in his pockets. He was handcuffed and put in a police car before the kitchen meth lab had been found.

The trial court denied the Defendant's motion to suppress the fruits of Deputy Murphy's search of his person.

At trial, Deputy Murphy largely repeated his suppression hearing testimony. He clarified, however, that the warrants which led him to Ms. Calaway's apartment were for a different Charles Paul Hale than the one he found in that apartment; at the time, Deputy Murphy believed he was serving the warrant on the correct Mr. Hale. He noted that Lieutenant Jody Cavanaugh and Deputy Todd Lassiter accompanied him to Ms. Calaway's apartment, that they arrested Ms. Calaway, and that they released the apartment's other occupant, Mr. Eddie Moore.

Deputy Murphy also introduced a full inventory of the items recovered from the garbage bag in the kitchen, which included a bottle of Brakleen, which contains a solvent used to manufacture methamphetamine, a bottle of acid, a quantity of methamphetamine oil, and coffee filters. In other areas of the apartment, Deputy Murphy found a hypodermic needle, foil, a few small red pills, and iodine stains on a chair. He also introduced the Defendant's jeans, again opining that they were stained with iodine. He sent all of the recovered items to the TBI for testing. He noted, however, that the TBI did not test for iodine and accordingly could not confirm his opinion that the Defendant's jeans were stained with iodine. As a witness experienced in methamphetamine investigations, Deputy Murphy opined that methamphetamine had been made in Ms. Calaway's apartment using the meth lab components he recovered.

On cross-examination by the pro se Defendant, Agent Murphy admitted he did not find any iodine crystals, red phosphorus, or pseudoephedrine, all of which are components of the methamphetamine manufacturing process.

Lieutenant Jody Cavanaugh of the Warren County Sheriff's Department generally corroborated Deputy Murphy's testimony, confirming that Ms. Calaway's apartment smelled of a methamphetamine lab and that iodine stains were present on a chair and on the Defendant's jeans. He also did not find any ephedrine, pseudoephedrine, iodine crystals, or red phosphorus, but noted that the recovered methamphetamine oil would contain those substances in a different form.

The State also introduced the TBI lab report reflecting the results of tests conducted on the items found in the Defendant's pockets. It showed that the Defendant had possessed .1 grams of methamphetamine and a small amount of marijuana. The Defendant stipulated to the chain of custody and the accuracy of the TBI tests.

The Defendant chose not to testify at trial, but put on witnesses in his own defense. Helen Eldridge, the Defendant's sister, testified that the Defendant had visited her house on March 9. Twenty to twenty-five minutes after he left, she received a call informing her that he had been arrested in a meth lab.

Chad Ralph, the Defendant's brother, testified that the Defendant stopped by his house on the day he was later arrested. The Defendant arrived between 8:00 and 10:00 a.m., and he was accompanied by a woman Mr. Ralph did not know. Mr. Ralph's residence was "a ways from" the Arms Apartments.

Ms. Calaway testified that she was acquainted with the Defendant and Paul Hale, whom she knew by a different name on March 9, 2007. On the evening of March 8, Ms. Calaway slept at her apartment. Her roommate, Eddie Moore, slept there, as well as the Defendant and Mr. Hale, whose truck had run out of gas nearby at about 11:00 p.m.

Ms. Calaway woke up the next morning sometime between 6:30 and 7:00 a.m. to put her son on his school bus. At about 8:30 a.m., the Defendant asked Ms. Calaway for a ride to his sister's house. She drove him there and waited for him in her truck. Between 11:00 and 11:30, Ms. Calaway dropped the Defendant off at a house on Fair Street. She then had her truck washed and stopped at a Big Lots store about a block from her apartment. At about noon, she returned to her apartment complex, where she saw the Defendant talking to a neighbor. Ms. Calaway went inside and saw Mr. Moore lying on the living room couch. Mr. Hale was smoking a cigarette in the bedroom. Ms. Calaway did not notice the Defendant come back in, but he must have done so because she saw him in the apartment when Deputy Murphy knocked on the door about five minutes later.

Ms. Calaway let Deputy Murphy into the apartment. Deputy Murphy realized that he had located a different Paul Hale than the one on his warrant; he also realized that Mr. Hale had other outstanding warrants and arrested him on those. Ms. Calaway gave Deputy Murphy permission to search the apartment; she was surprised when he found the methamphetamine lab components in her kitchen. She said the garbage bag in which the components were found was not in her apartment when she and the Defendant left that morning, and she confirmed that Mr. Hale and Mr. Moore were still in her apartment when they left. Ms. Calaway also said that Mr. Moore had been living with her for about two

weeks, but that she had seen no evidence he was involved in methamphetamine manufacture.

Ms. Calaway admitted that she had been arrested on March 9 and had pleaded guilty to promotion of the manufacture of methamphetamine. She said she was innocent of the charge, but that her case was resolved and that she accordingly had no incentive to lie for the Defendant. She did not notice any methamphetamine lab odors in her apartment on March 9. Finally, Ms. Calaway noted that she could not say whether the Defendant brought methamphetamine lab components into her apartment, because he returned to the apartment before she did.

Finally, the Defendant's father, Lawrence Ralph, Sr., testified that he saw the Defendant at the Defendant's sister's house on March 9, and that he received a call about the Defendant's arrest only thirty to sixty minutes after the Defendant had left the house.

The Defendant was convicted of one count of initiating a process to manufacture methamphetamine, one count of simple possession of methamphetamine, one count of simple possession of marijuana, and one count of possession of drug paraphernalia. He now appeals.

Analysis

I. Denial of Motion to Suppress

The Defendant first contends that the trial court erred in denying his motion to suppress the fruits of the search of his person. "[A] trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). We review a trial court's applications of law to fact de novo, however. See State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001). The party prevailing at the suppression hearing is further "entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from such evidence." Odom, 928 S.W.2d at 23. In reviewing a trial court's ruling on a motion to suppress, an appellate court may consider the evidence presented both at the suppression hearing and at the subsequent trial. State v. Henning, 975 S.W.2d 290, 299 (Tenn. 1998).

The Fourth Amendment to the United States Constitution states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." Our supreme court has noted that "a warrantless search or seizure is presumed unreasonable, and evidence discovered as a result thereof is subject to suppression unless the State demonstrates that the search or seizure was conducted pursuant to one of the narrowly

defined exceptions to the warrant requirement." State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997).

One exception to the warrant requirement allows police to search a person incident to a lawful arrest of that person. See State v. Richards, 286 S.W.3d 873, 878 (Tenn. 2009).

> In order to justify a warrantless search as incident to a lawful arrest, four conditions must be met: (1) the arresting officer must have probable cause to believe that the defendant had engaged or was engaging in illegal activity . . . ; (2) the probable cause must attach to an offense for which a full custodial arrest is permitted – i.e., there must be statutory grounds for a warrantless arrest . . . (3) the arrest must be consummated either prior to or contemporaneously with the search . . . ; (4) the search must be incident to, not the cause of, the arrest.

Id. (internal citations omitted).

First, "[w]hether probable cause is present depends upon whether the facts and circumstances and reliable information known to the police officer at the time of the arrest 'were sufficient to warrant a prudent man in believing that the [individual] had committed an offense.'" State v. Downey, 945 S.W.2d 102, 106 (Tenn. 1997)(quoting Beck v. Ohio, 379 U.S. 89, 91 (1964)). Based on the suppression hearing, the trial court found that Deputy Murphy had entered Ms. Calaway's apartment, smelled methamphetamine lab odors, found methamphetamine lab components, and observed what he believed to be iodine stains on the Defendant's pants. We agree with the trial court that this information was sufficient to warrant a prudent person in believing that the Defendant had manufactured methamphetamine. See id.

Second, Tennessee Code Annotated section 40-7-103(a)(3) provides that an officer may arrest a person without a warrant "[w]hen a felony has in fact been committed, and the officer has reasonable cause for believing the person arrested has committed the felony." Because manufacture of methamphetamine is at least a Class C felony, see Tennessee Code Annotated section 39-17-417(c)(2)(A), Deputy Murphy's probable cause attached to an offense for which there existed grounds for a warrantless arrest. Finally, our review reflects that the evidence does not preponderate against the trial court's finding that Deputy Murphy searched the Defendant prior to or contemporaneously with the search and that the search was incident to the Defendant's arrest.

We conclude the trial court did not err in finding Deputy Murphy's search of the Defendant permissible under the search incident to lawful arrest exception to the warrant requirement. This issue is without merit.

II. Sufficiency of the Evidence

The Defendant next contends that the State presented evidence insufficient to convict him of initiating a process to manufacture methamphetamine. Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557.

Tennessee Code Annotated section 39-17-435(a) provides that "[i]t is an offense for a person to knowingly initiate a process intended to result in the manufacture of any amount of methamphetamine." Further, "'initiates' means to begin the extraction of an immediate methamphetamine precursor from a commercial product, to begin the active modification of a commercial product for use in methamphetamine creation, or to heat or combine any substance or substances that can be used in methamphetamine creation." Tenn. Code Ann. § 39-17-435(c). "Expert testimony of a qualified law enforcement officer shall be admissible

for the proposition that a particular process can be used to manufacture methamphetamine." Tenn. Code Ann. § 39-17-435(d).

We conclude the evidence was sufficient to convict the Defendant. Ms. Calaway testified that the Defendant was at her apartment before she arrived home on March 9, confirming that he had the opportunity to be in her apartment with the later-discovered methamphetamine lab. Deputy Murphy, a law enforcement officer experienced in methamphetamine investigations, testified that iodine is a substance used in methamphetamine creation and that iodine spills were a frequent occurrence in the methamphetamine creation process. Finally, he noted that he saw what he believed to be iodine stains on the Defendant's pants. In our view, this testimony is sufficient to allow any rational jury to conclude that the Defendant made use of a quantity of iodine with the intention of creating methamphetamine. This issue is without merit.

III. Tennessee Rule of Criminal Procedure 16

At trial, the State impeached Ms. Calaway using a statement she made on November 27, 2007, in which she stated her belief that Mr. Hale and the Defendant, still her co-defendants at that time, had brought the methamphetamine lab equipment into her apartment without her knowledge. Having not received the statement in discovery, the Defendant objected to its use at trial, arguing that such use violated Tennessee Rule of Criminal Procedure 16(a)(1)(D), which provides that "[u]pon a defendant's request, when the state decides to place codefendants on trial jointly, the state shall promptly furnish each defendant who has moved for discovery under this subdivision with all information discoverable under Rule 16(a)(1)(A), (B), and (C) as to each codefendant." The trial court overruled the Defendant's objection, allowing the State to use the statement as a prior inconsistent statement. The Defendant contends that the trial court erred in doing so.

We disagree. As the State notes in its briefs, Rule 16(a)(1)(D) applies, by its plain language, only to situations in which the State "decides to place codefendants on trial jointly." Ms. Calaway and the Defendant were not tried jointly. This issue is without merit.

IV. Admission of TBI Lab Report

The Defendant was indicted as Lawrence D. Ralph, Jr. The TBI report indicating that the Defendant possessed .1 grams each of marijuana and methamphetamine lists his name as Lawrence Dale Ralph. On appeal, the Defendant contends that his name is Lawrence David Ralph, Jr. and that the TBI report was thus admitted in error.

Preliminarily, we note that the Defendant has waived this issue by failing to object to the report's admission at trial. See Tenn. R. App. P. 36(a). His brief also fails to cite any

authority in support of his argument; he has waived the issue for that reason as well. See Tenn. Ct. Crim. App. R. 10(b).

We therefore must treat this issue as waived unless it is deemed to be plain error. See Tenn. R. App. P. 52(b). Plain error requires that five factors be established: (1) "the record must clearly establish what happened in the trial court"; (2) "a clear and unequivocal rule of law must have been breached"; (3) "a substantial right of the accused must have been adversely affected"; (4) "the accused did not waive the issue for tactical reasons"; and (5) "consideration of the error is necessary to do substantial justice." State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994).

We decline to find plain error in this case because no clear and unequivocal rule of law has been breached. At trial, the Defendant only contended that Deputy Murphy testified falsely about finding contraband on him. In allowing the introduction of the TBI report without testimony from a TBI forensic scientist, the Defendant stipulated to the accuracy of the tests and the chain of custody of the contraband Deputy Murphy claimed to have recovered from the Defendant's person. These stipulations, in addition to Deputy Murphy's testimony that the TBI report resulted from his recovery of items from Ms. Calaway's apartment on March 9, fulfills Tennessee Rule of Evidence 901(a), which states that "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what the proponent claims." This issue is without merit.

V. Denial of Compulsory Process

A defense witness named Holly Clayton failed to appear at trial. The Defendant noted her absence to the court before trial began, but chose to proceed; when Ms. Clayton still had not arrived by the end of Ms. Calaway's testimony, the Defendant moved for a continuance. The trial court, noting that the Defendant's file did not contain a return on Ms. Clayton's subpoena, denied his motion. In an offer of proof after trial, the Defendant's uncle, David Ferrell, testified that he picked up a subpoena for Ms. Clayton and gave it to another of the Defendant's relatives, who said he would serve Ms. Clayton. Hearsay testimony by Mr. Ferrell suggested that Ms. Clayton received the subpoena but later contacted someone from the State who told Ms. Clayton she did not have to appear because the subpoena "wasn't properly served." The Defendant argues that the trial court erred by denying him a continuance for the purpose of locating Ms. Clayton, thus violating the right to compulsory process guaranteed him by the Sixth Amendment to the United States Constitution.

Defendants to criminal prosecution have the right under both our federal and state constitutions to compulsory process for obtaining witnesses in their favor. See U.S. Const. amend. VI; Tenn. Const. art. I, § 9. This right is further codified in our criminal code. See

Tenn. Code Ann. § 40-17-105. The right, however, is not absolute. As previously recognized by this Court, "the constitutional right to compulsory process requires such process for, and only for, competent, material, and resident witnesses whose expected testimony will be admissible." State v. Smith, 639 S.W.2d 677, 680 (Tenn. Crim. App.1982) (quoting Bacon v. State, 215 Tenn. 268, 385 S.W.2d 107, 109 (1964)). Thus, trial courts have "the power and the duty to prevent abuse of [their] process by abating subpoenas for witnesses whose testimony would be immaterial." State v. Womack, 591 S.W.2d 437, 443 (Tenn. App.1979). In reviewing a trial court's exercise of its power and duty to prevent abuse of its process, this Court applies an abuse of discretion standard. See State v. Connie Easterly, No. M2000-00077-CCA-R10-CO, 2001 WL 208514, at *7 (Tenn. Crim. App., Nashville, Mar. 1, 2001).

We cannot conclude that the trial court abused its discretion in denying the Defendant a continuance. No evidence suggested that the Defendant was prevented from subpoenaing Ms. Clayton. Even under the assumption that Ms. Clayton received a subpoena, despite the trial court's lack of a subpoena return, the Defendant offered no evidence to the trial court tending to establish what Ms. Clayton would have said had she appeared. The Defendant therefore failed to demonstrate that Ms. Clayton would have been a material witness, and the trial court did not abuse its discretion in denying him a continuance. This issue is without merit.

VI. Length of Sentence

Finally, the Defendant challenges the length of the sentence the trial court imposed upon him for initiating a process to manufacture methamphetamine. On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. See Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Comments; see also State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). When a defendant challenges the length, range, or manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that the determinations made by the court from which the appeal is taken are correct. Tenn. Code Ann. § 40-35-401(d). However, this presumption "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Pettus, 986 S.W.2d 540, 543-44 (Tenn. 1999); see also State v. Carter, 254 S.W.3d 335, 344-45 (Tenn. 2008). If our review reflects that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see also Carter, 254 S.W.3d at 344-45.

In conducting a de novo review of a sentence, this Court must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the

principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (f) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; and (g) any statement the defendant wishes to make in the defendant's own behalf about sentencing. Tenn. Code Ann. § 40-35-210(b); see also Carter, 254 S.W.3d at 343; State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002).

The Defendant's conduct occurred subsequent to the enactment of the 2005 amendments to the Sentencing Act, which became effective June 7, 2005. The amended statute no longer imposes a presumptive sentence. Carter, 254 S.W.3d at 343. As further explained by our supreme court in Carter,

> the trial court is free to select any sentence within the applicable range so long as the length of the sentence is "consistent with the purposes and principles of [the Sentencing Act]." [Tenn. Code Ann.] § 40-35-210(d). Those purposes and principles include "the imposition of a sentence justly deserved in relation to the seriousness of the offense," [Tenn. Code Ann.] § 40-35-102(1), a punishment sufficient "to prevent crime and promote respect for the law," [Tenn. Code Ann.] § 40-35-102(3), and consideration of a defendant's "potential or lack of potential for . . . rehabilitation," [Tenn. Code Ann.] § 40-35-103(5).

Id. (footnote omitted).

The 2005 Amendment to the Sentencing Act deleted appellate review of the weighing of the enhancement and mitigating factors, as it rendered these factors merely advisory, as opposed to binding, upon the trial court's sentencing decision. Id. Under current sentencing law, the trial court is nonetheless required to "consider" an advisory sentencing guideline that is relevant to the sentencing determination, including the application of enhancing and mitigating factors. Id. at 344. The trial court's weighing of various mitigating and enhancing factors is now left to the trial court's sound discretion. Id. Thus, the 2005 revision to Tennessee Code Annotated section 40-35-210 increases the amount of discretion a trial court exercises when imposing a sentencing term. Id. at 344.

To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and

balanced in determining the sentence. See id. at 343; State v. Samuels, 44 S.W.3d 489, 492 (Tenn. 2001). If our review reflects that the trial court applied inappropriate mitigating and/or enhancement factors or otherwise failed to follow the Sentencing Act, the presumption of correctness fails and our review is de novo. Carter, 254 S.W.3d at 345.

The presentence report in this case reflects that, at the time of sentencing, the Defendant was a forty-year-old divorced white male with past Ku Klux Klan affiliation. He dropped out of high school after the seventh grade, but earned his GED from the Tennessee Technical Center in Murfreesboro while incarcerated in 2005. The Defendant described himself as self-employed, noting that he did nursery work and odd jobs. The report notes that the Defendant took pain medication for back and neck problems.

The Defendant's extensive criminal history begins when he was eighteen years old and includes two convictions for driving without a valid license, three convictions for resisting a stop and frisk, six convictions for driving under the influence, three convictions for marijuana possession, two convictions for assault, and one conviction each for: disorderly conduct; possession of schedule IV drugs; public intoxication; evading arrest; harassment; unlawful use of drug paraphernalia; and being a habitual traffic offender.

As a Range II offender, the Defendant faced a twelve to twenty year sentencing range. The trial court sentenced him to seventeen years, finding as an enhancement factor that he had a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range. See Tenn. Code Ann. § 40-35-114(1). As a mitigating factor, the trial court considered the Defendant's procurement of his GED while incarcerated.

Our review of the record reflects that the trial court considered the principles of sentencing, relevant facts and circumstances, and the sentencing guidelines, including a correct application of both an enhancing and mitigating factor. We therefore presume that its determinations are correct, see Tennessee Code Annotated section 40-35-401(d), and affirm the length of the Defendant's sentence. This issue is without merit.

Conclusion

Based on the foregoing authorities and reasoning, we affirm the Defendant's convictions and sentence.

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DAVID H. WELLES, JUDGE